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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RATE ADJUSTMENT DUE TO EXTRAORDINARY OR EXCEPTIONAL CIRCUMSTANCES	)))	Docket No. R2013-10R

REPLY COMMENTS OF THE ASSOCIATION FOR POSTAL COMMERCE, ALLIANCE OF NONPROFIT MAILERS, MAJOR MAILERS ASSOCIATION, MPA—THE ASSOCIATION OF MAGAZINE MEDIA, AND NATIONAL POSTAL POLICY COUNCIL
(August 31, 2015)

Pursuant to Order No. 2586, the Association for Postal Commerce ("PostCom"), the Alliance of Nonprofit Mailers ("ANM"), Major Mailers Association ("MMA"), MPA—The Association of Magazine Media ("MPA"), and the National Postal Policy Council ("NPPC") (collectively, "PostCom, *et al.*") submit these reply comments in response to the comments filed by the United States Postal Service ("Postal Service"), the Public Representative, and others on the Commission's proposed standard for determining whether a change in mail preparation requirements has rate effects with price cap implications.

There is widespread agreement among the commenting parties, including the Postal Service, that the Commission's proposed standard should not be adopted. The question is what should be put in its place. The Postal Service essentially argues for eliminating any standard, instead confining the Commission to review of changes in posted rates (or, alternatively, changes to posted rates or size, weight, and minimum volume thresholds that define products in the Mail Classification Schedule ("MCS")). This approach vastly oversimplifies the relevant legal standards and ignores the obvious principle, recognized by the Commission, the D.C. Circuit,

and the Supreme Court, that changes in regulations governing the use of rates can effectively causes changes in the rates mailers pay.

The Public Representative properly recognizes this principle. Like PostCom, *et al.*, the Public Representative properly defines the question before the Commission as when changes in rates resulting from rule changes are significant enough to warrant requiring the Postal Service to demonstrate that the changes comply with the price cap. The Public Representative, like PostCom, *et al.*, looks to the Commission's existing rules regarding *de minimis* rate changes to establish a workable standard for defining when a rule change should be evaluated under the price cap. PostCom, *et al*. differ with the Public Representative, however, regarding (1) the procedures by which the price effects of rule changes should be evaluated, and (2) the Public Representative's suggestion that the Postal Service should be allowed to garner increased price cap authority from rules changes that result in *de facto* lower rates.

I. THE POSTAL SERVICE PROPOSAL TO REVIEW ONLY POSTED RATES IS TOO NARROW AND THEREFORE USELESS

The Postal Service contends that applying "the price cap only to changes in posted rates . . . is clearly the most effective way to provide the clarity and predictability envisioned in the [DC Circuit's] decision." USPS Comments at 2. PostCom, *et al.* disagree. The Postal Service's standard simply ignores the potential rate impacts of changes in mail preparation requirements and other rule and classification changes. The Postal Service would be free to impose whatever rule changes it wants, no matter how large their rate effects, so long as the changes do not affect the "posted rates." The Postal Service's standard simply ignores the potential rate impacts of changes in mail preparation requirements and other rule and classification changes. Acceptance of the Postal Service's position would enable the Postal Service to evade Commission review of real rate changes simply by declining to acknowledge those changes in posted rates. This is

unlawful. There is no difference to mailers between a rate change effected through a change in posted rates and one, such as the Full Service IMb requirement, made through a change in regulation or classification. As the Commission noted in Order No. 1890, "[e]nsuring the Postal Service does not exceed the annual limitation [on increases in rates] is . . . fundamental to" the Commission's statutory responsibility. Order No. 1890 at 16.

By contrast, using the *de minimis* standard, as PostCom, *et al.* suggest, not only provides clarity and predictability, but it also helps the Commission fulfill its charge to ensure the Postal Service remains within the price cap. Because the *de minimis* standard proposed by PostCom, *et al.* accounts for *all* of the increases in rates the Postal Service makes, by whatever means, and empowers the Commission to review those changes, it, not the Postal Service's standard, "is . . . the option that is most consistent with the overall statutory framework created by Congress." USPS Comments at 2.

A. Rule changes indisputably have rate effects

In Order No. 1890, the Commission stated that "[t]he definition of 'rates' provided by 39 U.S.C. § 102(7) does not limit the term to those sources of revenue considered by the Postal Service to be rates or identified by the Postal Service in a notice as such." Order No. 1890 at 23. It further explained that its rules regarding the calculation of the price cap when rate cells are introduced, deleted or redefined were instituted precisely to address the rate effects of classification changes. *Id.* at 20-21. The Commission relied on this analysis in determining that the Full Service IMb requirement has rate effects that must be accounted for under the price cap.

In reviewing the Commission's decision, the D.C. Circuit stated that "[t]he critical statutory question in this case is whether 'changes in rates' encompasses only changes to the official posted prices of each product . . . or also changes to the prices actually applied to particular mailpieces." 785 F.3d at 751. It noted that "[t]he Commission's interpretation . . .

prevents the Postal Service from evading the price cap by shifting mailpieces to higher rates through manipulation of its mail preparation requirements." *Id*. It characterized as "self-evident" the "fact that changes in classifications can *cause* changes in the rates experienced by mailers" and noted that the Postal Service does not dispute this point. *Id.* at 752 (emphasis in original). The court further noted that changes to the Mail Classification Schedule and to the Domestic Mail Manual "can cause a change in the rates paid by mailers." *Id.* at 753. Ultimately, the D.C. Circuit endorsed the Commission's findings on this issue, holding that the "Commission's interpretation is . . . consistent with the price cap's language and purpose, and the Commission's delegated authority to administer the cap." 785 F.3d at 751.

Both the Commission's and the court's findings are in line with precedent under other statutes granting an agency authority to regulate rates. For example, in addressing a dispute involving telecommunications providers, the Supreme Court rejected the appellate court's finding that the filed rate doctrine did not apply because the dispute involved "provisioning of services and billing" rather than "rates or ratesetting." *AT&T v. Cent. Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) (internal quotation omitted). The Court explained that "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached." *Id*. The Court explained that the Communications Act requires carriers to set forth "classifications, practices, and regulations affecting" their charges precisely because these items are inextricably linked to the rates themselves. *Id*. Consequently, the filed rate doctrine and anti-discrimination provisions of the statute applied to aspects of the carrier's services beyond just the posted rates.

In its initial comments, the Postal Service does not directly dispute this principle. In fact, it acknowledges that "[r]ate distinctions based on mailer behavior are aimed at structuring a

mailer's economic choices to provide incentives leading to efficient Postal Service processing" and that these distinctions "form part of a dynamic give-and-take process of resource allocation between the Postal Service and mailers." USPS Comments at 27. The Postal Service further concedes that "certain mail-preparation requirements . . . are significant enough that they form the basis for rate distinctions in the MCS." *Id.* at 28. While the Postal Service does not provide a principle for distinguishing between requirements that can form the basis for rate distinctions and those that do not, the Postal Service at least recognizes that preparation requirements play an important role in determining the rates mailers pay. Accordingly, there is no dispute as to whether changes to mail preparation requirements can have rate effects;[1] the only question is whether and how the Commission should address these effects.

B. The Commission has an affirmative duty to consider non-trivial rate effects resulting from changes to mail preparation standards

Given the widespread acknowledgement that changes to mail preparation requirements can affect the rates mailers pay, it would be unreasonable for the Commission to adopt a standard that ignores these effects, as the Postal Service urges it to do.[2] Instead, the Commission must adopt a standard that acknowledges the impact changes in mail preparation requirements can have on rates and ensures any resulting changes in rates comply with the price cap.

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[1] Applied to the current rate schedule, for example, a rule that shifted a 3-oz. flat from DSCF Standard Mail CR to DSCF Standard Mail 5D Automation would increase the rate paid per piece from 25.6 cents to 34.8 cents.

[2] The approach advocated by the Postal Service would also significantly weaken the Commission's existing rules regarding the price cap effects of the introduction, deletion, or redefinition of rate cells. *See* 39 C.F.R. 3010.23(d)(2). Consistent with the existing rules and as noted in Order No. 2586, a workable standard must account for changes in mail preparation requirements that cause a shift in volume from one rate category to another such that the change results in a "de facto elimination of a rate category or the deletion of a rate cell." Order No. 2586 at 4. The Commission's proposed approach, at least, explicitly considered that effect. The Postal Service's approach would ignore those effects for all but a small subset of prescribed changes.

The Postal Service's proposal is not "consistent with the court order and the overall statutory framework created by Congress," both of which acknowledge that the Commission has the duty and authority to evaluate whether rate changes comply with the price cap. USPS Comments at 28. The Commission itself acknowledged this duty when it first rejected a similar proposal by the Postal Service in Order No. 1890. There, the Commission dismissed the Postal Service's argument that "its choice to publish notice of a mail preparation change in the *Federal Register* rather than to file a notice of rate adjustment or a request to modify the MCS with the Commission should control the analysis" of whether the change has an effect on rates. Order No. 1890 at 26. As the Commission recognized, "[s]uch an approach would shift the responsibility for setting and enforcing the annual limitation . . . from the Commission to the Postal Service." *Id.* The Commission properly noted that this result was inconsistent with PAEA, and that the Commission "cannot cede its statutory responsibility to enforce the price cap to the Postal Service by allowing the Postal Service's subjective intent or how it formats its proposals to control." *Id.* at 27. Instead, the Commission must look "to the effect of a change on the rates paid by mailers," as such an approach is "consistent with the Commission's statutory duty to set the annual limitation on the percentage change in rates and enforce that limitation." *Id.*

Nothing in the D.C. Circuit's opinion suggests that the Commission misapprehended its statutory duty in Order No. 1890. Instead, the court recognized that the "Commission's interpretation of the statute prevents the Postal Service from evading the price cap by shifting mailpieces to higher rates through manipulation of its mail preparation requirements," an interpretation that is "consistent with the price cap's language and purpose, and the Commission's delegated authority to administer the cap." 785 F.3d at 751.

The Postal Service provides no reason for abandoning this interpretation other than that "the rates-only approach provides predictability and clarity regarding what changes are subject to the cap." USPS Comments at 28. The need for "predictability and clarity," however, cannot justify the significant transfer of authority over price cap compliance from the Commission to the Postal Service that the Postal Service's proposal represents. Further, while the proposal might provide "predictability and clarity" to the Postal Service, it would not provide these same benefits to mailers, who would be subject to *de facto* rate increases at any time with little recourse. The Commission should continue to provide predictability and clarity regarding the rates mailers will pay by rejecting the Postal Service's proposal and reaffirming its court-endorsed authority to regulate mail preparation changes with rate effects.

The same reasoning applies to the Postal Service's alternative proposal, under which only changes in size, weight, or minimum-volume thresholds as defined in the current MCS would be reviewed. While this proposal would retain some of the Commission's authority to ensure price cap compliance, and thus would be marginally superior to the "rates only" proposal, it would still ignore numerous mail preparation changes that could have significant rate effects, such as increases in bundle minimums or the Full Service IMb requirement—the very rule change that prompted the present dispute.

C. The *de minimis* standard proposed by PostCom, *et al.* best balances the need for clarity and predictability with the Commission's duty to enforce the price cap

As PostCom, *et al.* argued in their initial comments, the Commission can resolve this case by applying the *de minimis* standard contained in 39 C.F.R. § 3010.30 to evaluate the rate impact caused by mandating the use of Full Service IMb. This standard can also be applied in future cases to determine whether a *de facto* rate increase caused by mail preparation and/or classification changes must be accounted for in price cap calculations and whether the Postal

Service must file a notice of rate change when it makes such changes. The Public Representative recognizes the usefulness of this standard as well. Public Representative Comments at 11-12. The use of this standard would be consistent with the statute, allowing the Commission to exercise its duty to define and ensure compliance with the price cap while allowing the Postal Service the flexibility to make operational changes that are without significant rate effects. For these reasons, use of the *de minimis* standard is superior to the Postal Service's proposed standards. Unlike either of the Postal Service's proposals, it preserves the Commission's authority to oversee rate increases, no matter their cause.

The Postal Service makes several arguments suggesting that no new standard needs to be developed because mailers are already sufficiently protected by existing Commission rules and procedures. None of the protections the Postal Service cites, however, would protect mailers and preserve the Commission's authority over rates as well as the *de minimis* standard. For instance, the Postal Service suggests that pre-enforcement review of MCS changes could limit any adverse impact of *de facto* rate increases resulting from classification changes. USPS Comments at 22. But this process would provide no relief from rule (and consequent rate) changes effected through changes in the DMM or more informal publications. In any event, what if a proposed rule change (1) has significant rate effects, but (2) is nonetheless likely to make both the USPS and mailers better off because of the efficiency gains? Limiting the PRC to the binary options of approving or denying the MCS change outright does not effectively address this situation, and in fact could insert the Commission into operational areas. The proposal would force the Commission to choose between (1) ignoring rule changes with significant rate effects, or (2) intruding into operational matters that properly fall within the Postal Service's managerial discretion. Approving otherwise-lawful operational changes as long as the Postal Service

properly accounts for their rate effects under the CPI cap avoids this Hobson's choice. When a rule change has significant rate effects, the rate effects should be reviewed directly under the price cap rules, rather than under the rules for classification changes generally.

The Postal Service's suggestion that mailers could seek relief from the Commission through "rate and service complaints" and the Commission's authority to "reverse changes by the Postal Service and impose fines" (USPS Comments at 22) is also without merit. Among other inadequacies of the complaint process in this context, the Commission lacks authority to award refunds or reparations to mailers, and thus cannot make mailers whole with after-the-fact relief for rates paid in excess of the CPI cap during the pendency of the complaint proceeding. (Fines assessed by the Commission under 39 U.S.C. § 3662(d) go the "general fund" of the U.S. Treasury, not to mailers.) Use of the *de minimis* standard, along with the procedures described in the Petition for Rulemaking in Docket No. RM2015-20, is simpler, more cost-effective, and will make better use of the resources of all parties.

Further, the use of the *de minimis* standard would complement, not replace, the other avenues of relief cited by the Postal Service. Mailers would still have the ability to file complaints. And to the extent the Postal Service makes MCS changes, the Commission will still have the opportunity to rule on the proposed changes through that process. The *de minimis* standard simply affirms the Commission's authority to review rate changes made outside of these regular processes.

PostCom, *et al.* believe that the *de minimis* standard can be applied to the instant proceeding as well as future proceedings, but they recognize that the Commission's current rules do not provide a clear procedure by which mailers can bring changes in mail preparation standards that might have rate effects to the Commission's attention outside of rate increase

filings or the Annual Compliance Determination ("ACD"). Any changes to the Commission's rules that would be required to implement this standard going forward need not be addressed in this docket, however. Instead, they should be considered in Docket No. RM2015-20.

Finally, the *de minimis* standard has the added benefit of not imposing any restrictions on the Postal Service's ability to make changes to mail preparation requirements. Nor does it grant the Commission any additional authority to oversee such changes. It simply acknowledges that such changes may have rate effects. As long as the Postal Service stays within the price cap and complies with the non-pricing requirements of Title 39, it can make whatever changes to mail preparation requirements it desires. And if these changes are truly improving the efficiency of Postal Service operations, rather than serving simply as revenue enhancers, the Postal Service will not be harmed by the loss of any price cap authority resulting from the change.

II. THE PUBLIC REPRESENTATIVE STATES THE CORRECT GUIDING PRINCIPLE, BUT PROPOSES UNNECESSARY OR INEFFICIENT ENFORCEMENT PROCEDURES

The Public Representative's comments are generally consistent with PostCom, *et al.'s* diagnosis of the problems with the standard proposed by the Commission. The Public Representative's solution, too, is generally consistent with the views of PostCom, *et al*. to the extent it calls for the Commission "to treat all changes [in mail preparation requirements] as having a potential [rate] impact, and measure the revenue impact" of those changes. Public Representative Comments at 3. The views of PostCom, *et al.* differ from those of the Public Representative primarily in two respects: (1) when the rate impact of mail preparation changes made outside of an annual price change should be evaluated, and (2) whether the Postal Service should receive additional price cap authority if the revenue impact of the changes is less significant than anticipated at the time of the change.

With respect to the first issue, the Public Representative suggests that the Commission should examine the revenue impact of mail preparation changes made outside of a noticed price change during the ACD. PostCom, *et al.* acknowledge that under the Commission's existing rules, the ACD may be an appropriate context in which to examine these impacts. But if the ACD were the only context in which such changes can be raised with the Commission, this would allow the Postal Service to potentially exceed the price cap for the entire period between the implementation of the rule change and the next rate adjustment after the Commission rules on the impact of those adjustments in the ACD. While the Postal Service's rate authority would then be limited going forward, mailers would have no recourse with respect to any excessive payments they have already made. It is therefore important to develop a procedure through which the potential rate impacts of proposed changes in mail preparation requirements can be immediately evaluated. One set of procedures that could provide this protection is described in rulemaking petition of PostCom and the Alliance for Nonprofit Mailers in RM2015-20.

Next, the Public Representative, using the example of the new FSS requirements adopted for Periodicals mail in Docket No. R2013-10, proposes that the Postal Service receive credits to bank when proposed rule changes have *negative* revenue effects. Public Representative Comments at 20-21. This proposal is conceptually unsound and, in any event, outside the scope of this Docket. Although the Public Representative's proposal is not fully explained in its comments, it seems to rest on the principle that, if the Postal Service makes changes to mail preparation standards that enable mailers to qualify mail or more mail for lower rates, the Postal Service should be allowed to revisit its cap calculation a year or more later to see if it overestimated the effect of the change. Undermining the clarity of the CPI index in that way is well outside the scope of this docket and is not necessary. Presumably, when the Postal Service

makes changes that benefit mailers, it does so because it has found more efficient ways of handling the mail or because a standard originally adopted has been found to be unnecessarily rigid.

In neither case should the Postal Service be rewarded with additional banking authority which will only allow it to increase the rates for mailers at some later time. The benefits of efficiency in operations will already redound to the Postal Service in a price cap regime without the creation of additional cap authority because the Postal Service is entitled to retain any difference between its costs in providing the service and the price-cap limited rate it charges for that service.[3] In any event, the issue the Public Representative has raised is outside the scope of this docket and unnecessary to the resolution of the case on remand. If the Commission wishes to consider whether after-the-fact review of adjustments made to billing determinants would result in more accurate price cap calculations, it should open a separate docket to consider that issue.

III. CONCLUSION

In Order No. 1890, the Commission properly recognized its authority to ensure that all rate increases, no matter whether they are contained in official posted rates, comply with the

[3] The specific example offered by the Public Representative—of a rule change that supposedly has negative rate effects—is anomalous in another respect. FSS preparation was optional before January 2014, and the Postal Service provided a similar piece incentive before Docket No. R2013-10. (The incentive provision offered carrier route pieces prepared in FSS bundles the 5D bundle rate, which was similar to the FSS bundle rate and much lower than the carrier route bundle rate.) The notion that making previously-optional worksharing mandatory constitutes a rate *decrease* is illogical on its face. The more plausible conclusion is that relatively few mailers engaged in optional FSS preparation before the Postal Service mandated it because the costs of FSS preparation exceeded the postage benefit.

Moreover, crediting the USPS with banked Periodicals authority from R2013-10 is inappropriate because the Commission subsequently extinguished all banked authority in R2013-11, the exigent case. In any event, the Periodicals banked authority going into R2013-11 would still have been negative even with the adjustment proposed by the Public Representative.

annual limitation imposed by the price cap, and the Court of Appeals has affirmed that authority. Adopting either of the proposals put forth by the Postal Service in its initial comments would result in the abdication of this authority. To ensure the integrity of the price cap and implement a standard consistent with the statute, the Commission should instead treat all changes to mail preparation requirements as potentially having a rate effect. Only those changes with a *de minimis* impact on rates should be exempt from compliance with the price cap.

Respectfully submitted,

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